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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Amador)

JUSTIN YELINEK et al., Plaintiffs and Appellants, v. ROBERT LANE, Defendant and Respondent.	C061919 (Super. Ct. No. 07CV4694)

After Jason Yelinek and Robin Yelinek (collectively, the Yelineks) purchased a house from Robert Lane in 2004, they became dissatisfied with its construction. After Lane refused to engage in mediation, the Yelineks sued him for failure to make proper written disclosures, breach of implied warranty, negligence, negligent misrepresentation, and fraud. A jury found in favor of Lane on all causes of action, and judgment was entered accordingly. The trial court subsequently awarded Lane $49,575 in attorney's fees and $3,808.20 in costs.

On appeal, the Yelineks argue that the trial court erred by (1) disallowing them from amending their complaint during trial,

(2) excluding evidence of Lane's prior felony conviction, (3) excluding evidence of a taped doorknob, (4) admitting evidence of statements made in connection with settlement negotiations, (5) misstating the law by instructed the jury with CACI Nos. 413 and 1242, (6) commenting on the competence of the realtors involved in the sales transaction, (7) entering judgment in favor of Lane even though the evidence "as a whole" favored the Yelineks, (8) entering judgment after the jury returned inconsistent responses in its special verdict form, (9) failing to grant judgment for the Yelineks because the "evidence points to one conclusion: Robert Lane did not honestly and fairly represent the condition of the . . . property," (10) excluding the testimony of their proposed witness, Timothy Hall, (11) failing to properly take into account Lane's judicial admissions regarding installation of the propane tank on part of the neighbor's property and liability for damages arising out of faulty installation, (12) awarding attorney's fees to Lane even though he did not engage in mediation as required by the fee-shifting provisions of the real estate sale contract, and (13) awarding costs not authorized by Code of Civil Procedure section 1033.5.

We affirm the judgment, including the award of attorney's fees and costs.

FACTUAL AND PROCEDURAL HISTORY

On appeal after a jury trial, "[w]e presume there is evidence to support every finding unless the appellant demonstrates otherwise and we draw all reasonable inferences from the record to support the judgment." (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 420.) For purposes of appeal, the testimony of a single credible witness suffices to establish a fact. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) Viewed in the light most favorable to the judgment, the evidence at trial established:

Construction of the House

Lane is a licensed contractor who was building a house for himself at 16851 Alpine Drive in Pioneer, California, in early 2004.

The house required a septic system, and Lane hired Jeff Morlan to draw the plans for the system. Morlan has provided plans for at least 2,000 to 3,000 septic systems and is "the best in the county." Lane installed the septic system himself according to Morlan's plans. Over the course of 25 years, Lane has installed about 500 septic tanks – including about 200 to 250 in Amador County.

Before installing the septic system, Lane had Douglas Ketron survey the property. Lane relied on the plot plan from the County of Amador to determine the boundaries of the lot.

The lines for the septic system were marked on the ground by an engineer who works with Morlan. Lane also installed risers for the septic system and received approval of the riser placement from county inspectors.

Lane was personally present when the septic system was inspected and approved for the builder's "green card," which indicated that the septic system was 90 percent complete. At the time that a septic system is "certified as ninety percent" it must have all associated equipment properly installed. Thus, "the phrase ninety percent is really just a term of art as opposed to some sort of percentage estimation on the completion of the job . . . ."

Lane also trenched the underground propane gas line for the house. Lane has dug lines for propane gas delivery about 50 times. The trench did not encroach on the neighbor's property.

While using a backhoe to install pipes, Lane accidentally crushed a pipe in the neighbor's yard. Lane fixed the neighbor's pipe. However, that pipe was not connected in any way to the septic system or propane gas lines for the house.

On March 31, 2004, Lane signed a notice of completion for the house. The county's final inspection – including that of the septic system – had been completed before Lane signed his notice of completion.

Sale to the Yelineks

Although Lane originally intended to occupy the house himself, the real estate market was "so good" that he decided to list the house for sale even before it was fully complete.

In January 2004, Justin Yelinek and Robin Lynn Cunha planned to get married and were looking to buy a house.[1] The Yelineks made an offer to buy Lane's house almost immediately after it was listed for sale. Lane was stunned at how quickly the Yelineks made an offer. Ultimately, Lane sold the house to the Yelineks for $241,000 with a $6,000 credit to the buyers for closing costs.

The Yelineks' realtor filled out a "real estate transfer disclosure statement" that was signed by buyers and the seller. Lane signed the document without reading it, having decided to rely on his realtor to ensure its accuracy.

Prior to the completion of the sale, the Yelineks obtained an independent home inspection report. The report did not indicate any defect with the house or encroachment onto the neighbor's property.

After the sale, Lane continued to work on the house by changing the lighting fixtures and laying linoleum flooring. Lane did "extra things" to please the Yelineks because Lane

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[1] The couple subsequently married, and wife changed her name to Robin Yelinek.

"wanted them happy." None of the extra work was required by the sales contract.

Dissatisfaction with Construction

Sometime after the sale, Timothy Hall – an inspector with the Amador County Environmental Health Department – sent a letter to the Yelineks informing them that the septic system required substantial repairs. The Yelineks undertook a redesign of the system.

Lane did not recall the Yelineks contacting him in May 2005 about a problem with the septic system. To Lane's knowledge the septic system worked perfectly. If the Yelineks had the septic system pumped, they did so unnecessarily. Douglas Ketron, a civil engineer with experience in septic systems, testified that "[t]here is absolutely no reason for replacing the system" installed by Lane. The septic system was working correctly.

In October 2005, the Yelineks received a letter from Michael Israel. Israel was director of the Amador County Environmental Health Department with authority to grant final approval to any septic system in the county. The letter outlined six minor corrections that needed to be made to the septic system in order to secure final approval.

At trial, Israel explained that Hall exceeded his authority in sending his letter to the Yelineks "[b]ecause it was based on a single incomplete inspection." Ketron testified, "I would not have faith in Tim Hall. In my experience over the years, Tim

Hall is not a person that I was willing to risk my license for. [¶] . . . Tim Hall was one of those people that would make requirements that I did not feel comfortable risking my license over."

Rather than require replacement of the septic system, Israel offered the simpler and cheaper solution of fixing the six items in his letter because he "was not convinced that this system has a significant problem." Israel also noted that the lack of inspection pipes around the septic system was a minor detail and "not [a] substantial defect[] of the system . . . ." Ketron echoed this assessment, testifying that there was no reason to replace the septic system. Ketron's inspection of the system revealed no signs of standing water that would indicate a failure of the septic system.

Ketron testified that several of the items listed in Israel's letter constituted routine maintenance rather than corrections of defects in the original installation. Two of the items pertained to monitoring pipes that might have been installed during the original construction but subsequently buried or removed by the property owner. On this point, Lane testified that the Yelineks had graded the yard around the septic system in order to install a lawn. Justin Yelinek had indicated that he did not want any pipes sticking out of his lawn.

At no time did the Yelineks complain to Lane about anything inside the house. Neither did they indicate to Lane that there was any problem with the propane tank encroaching on the neighbor's property. Lane considered the Yelineks friends and stated that he would have "been there in a minute" if Justin Yelinek had expressed a problem with the house.

After learning of the septic problem, Lane paid $96 to secure a permit from the County of Amador to fix the septic problems identified by Israel. Lane was willing to fix any problem at his own expense "[b]ecause it was the right thing to do." However, the Yelineks refused to allow Lane to fix any problems. Morlan and Ketron each estimated that the repairs to the septic system called for in Israel's letter would have cost no more than $560 to implement.

DISCUSSION

I

Claimed Denial of Leave to Amend the Complaint

The Yelineks contend the trial court erred in disallowing them from amending their complaint during trial to include a new legal theory involving the covenants, conditions and restrictions (CC&Rs) that applied to their house. We reject the argument even though no respondent's brief has been filed in opposition.

Lane failed to file a brief though he received due notice pursuant to rule 8.220(a)(2) of the California Rules of Court.

Nonetheless, we "examine the record on the basis of appellant's brief and . . . reverse only if prejudicial error is found. (*Baldwin v. Baldwin* (1944) 67 Cal.App.2d 175, 153; *Jarvis v. O'Brien* (1957) 147 Cal.App.2d 758.)" (*Walker v. Porter* (1974) 44 Cal.App.3d 174, 177.)

A

After opening arguments, the trial court apprised the jury of the causes of action asserted by the Yelineks. Counsel for the Yelineks then informed the court that he perceived an additional legal theory. Counsel stated: "There's the CC&R's issue as well, Your Honor." The trial court responded that it was unable to "find that in the Complaint." The Yelineks' attorney responded, "I don't know if it was drafted in the complaint, Your Honor."

Counsel for both sides asked to address the CC&Rs issue outside the presence of the jury. During a short recess, the following colloquy occurred:

"[Plaintiffs' counsel]: . . . Looking up at paragraph 30: On or about April 2nd plaintiffs did close escrow on subject property based on the promises and representations of the defendant that the subject property had been constructed, in a working-like manner, and all government permits and related inspections completed as required. [¶] Then I go on. In [paragraph] 33 it says that defendants were ignorant of the true facts. The representations that are contained in the transfer

disclosure agreement talk about any CC&R's, and that would get to the breach of contract issue. And I do not think that the Complaint has to list every single possible item that may or may not be.

"[Defendant's counsel]: Your Honor, this is sand-bagging.

"[Plaintiffs' counsel]: Wait a minute.

"[Defendant's counsel]: This is sand-bagging.

"THE COURT: This is sand-bagging.

"[Defendant's counsel]: It's like waiting until the last minute, waiting until opening statement. In all the discussions I've had with [plaintiff's counsel] until now, I've never heard anything with CC&R's.

"[Plaintiffs' counsel]: We haven't had any discussions.

"[Defendant's counsel]: If I can finish. We've had discussions and they were all shut up quick by you.

"[Plaintiffs' counsel]: Well, wait a minute. I've never said shut up to you.

"THE COURT: For a violation of CC&R, it would require you to designate in your complaint what the CC&R was and how it was violated."

The court subsequently ruled that "[i]t's clearly outside the scope of the Complaint." Thus, the court directed counsel not to mention the issue to the jury.

B

The Yelineks assert that their attorney "moved to amend the pleading, the Complaint . . . ." The record does not support their assertion. Instead, the reporter's transcript shows that the Yelineks' counsel attempted to persuade the court that the new legal theory alleging a violation of the CC&Rs was encompassed within the extant complaint. The Yelineks' counsel did not request leave to amend the complaint.

For failure to request leave to amend the complaint, the Yelineks have forfeited the argument. A trial court must be given an opportunity to consider a request for leave to amend a complaint to state a new cause of action before an appellant may challenge the issue on appeal. The Yelineks are "barred by the familiar rule that having failed to raise the issue in the trial court, [they] will not be heard to raise it for the first time on appeal." (*Jansen Associates, Inc. v. Codercard, Inc.* (1990) 218 Cal.App.3d 1166, 1170.)

C

Even if the Yelineks had requested leave to amend, the trial court would not have abused its discretion in denying the request. The Yelineks waited to introduce a new legal theory until trial commenced despite their assertion of having been aware of the CCR's as a result of discovery.

"Although courts are bound to apply a policy of great liberality in permitting amendments to the complaint at any

stage of the proceedings, up to and including trial [citations], this policy should be applied only '[w]here no prejudice is shown to the adverse party. . . .' (*Higgins v. Del Faro, supra*, at p. 564.) A different result is indicated '[w]here inexcusable delay and probable prejudice to the opposing party' is shown. (*Estate of Murphy* (1978) 82 Cal.App.3d 304, 311.) In *Murphy*, '. . . the proposed amendment opened up an entirely new field of inquiry without any satisfactory explanation as to why this major change in point of attack had not been made long before trial.' (*Ibid*.)" (*Magpali v. Farmers Group, Inc*. (1996) 48 Cal.App.4th 471, 487.)

As the trial court noted, the late amendment would have "sand-bagged" the defense, which would have been prejudiced by a lack of preparation on the newly asserted theory. The trial court was not required to allow a tardy amendment of the complaint.

II

Exclusion of Lane's Prior Felony Conviction

The Yelineks argue that the trial court erred in excluding evidence of Lane's prior felony conviction. In an argument encompassing only two paragraphs, the Yelineks seem to assert that the trial court had no authority to grant the defense's oral motion to exclude evidence of the prior conviction. We deem the argument to be forfeited.

In support of their argument, the Yelineks offer no legal authority. However, "[t]o demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239, fn. 16; *In re Marriage of Nichols* (1994) 27 Cal.App.4th 661, 672-673, fn. 3.) When a point is asserted without argument and authority for the proposition, 'it is deemed to be without foundation and requires no discussion by the reviewing court.' (*Atchley v. City of Fresno* [(1984)] 151 Cal.App.3d [635,] 647; accord, *Berger v. Godden* [(1985)] 163 Cal.App.3d [1113,] 1117 ['failure of appellant to advance any pertinent or intelligible legal argument . . . constitute[s] an abandonment of the [claim of error']].)" (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.) Here, the Yelineks' legally unsupported and conclusory argument fails to properly tender the issue for review.

In any event, the contention has no merit. We review evidentiary rulings under Evidence Code section 352 for abuse of discretion. (*People v. Davis* (2009) 46 Cal.4th 539, 602.) "To establish an abuse of discretion, the complaining party must show that '"the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." [Citation.]'

(*People v. Carrington* (2009) 47 Cal.4th 145, 195.)" (*Ghadrdan v. Gorabi* (2010) 182 Cal.App.4th 416, 420-421.)

The trial court excluded a conviction that Lane sustained for "insurance fraud." In so ruling, the trial court explained: "It's a completely different type of fraud allegation, totally different type. Insurance fraud and misrepresenting a building that you own to a seller, that's one reason, one reason in favor of the defendant." The court further explained: "Number two, it's 25 years ago. That's a long time. [¶] And, number three, I really don't know what it is yet. I don't know. The defendant says insurance fraud, but I don't know what the statute was, what the statute says. [¶] So I doubt, even if you present to the Court the statute that he was convicted of and show me that he was actually – when he was actually convicted and of what, I doubt still that I would allow that as impeachment evidence in this case. I'll just give you that indication."

The trial court court's reasons for excluding an old conviction with little apparent probative value were not arbitrary, capricious, or beyond the bounds of reason.

Contrary to the Yelineks' assertion, the jury did not need to be instructed on how to view evidence of a prior conviction. A party is entitled to have the jury instructed on how to view certain evidence only if such evidence was actually introduced. (See *Thompson Pacific Const., Inc. v. City of Sunnyvale* (2007)

155 Cal.App.4th 525, 547; *Bains v. Western Pacific R.R. Co.* (1976) 56 Cal.App.3d 902, 905.) Here, the jury did not hear evidence regarding the conviction. Consequently, no instruction on how to view the evidence of a felony conviction was required.

The trial court did not err in excluding evidence of Lane's prior conviction or in failing to instruct on how to view evidence of a prior conviction.

III

Exclusion of Evidence Showing a Taped Door Knob

The Yelineks contend the trial court erroneously excluded from evidence a photograph of a taped doorknob. They argue: "This was evidence of the defendant's 'vandalism' of the Yelineks' home, and was credible proof of the defendant's state of mind at the time he taped his letter to the Yelineks front door on January 23, 2007."

In support of their argument, the Yelineks do not refer us to anywhere in the record that shows they moved to introduce the photograph into evidence. The argument is therefore forfeited. (Cal. Rules of Court, rule 8.204(a)(1)(B); *Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 743 [failure to cite to the record waives the claim of error].)

IV

Admission of Evidence of Settlement Offers

The Yelineks' brief asserts that "the court, over plaintiffs' objections, allowed defendant's testimony regarding

a purported settlement offer by defendant, and purported profane statements made by plaintiff's [*sic*] counsel." However, the Yelineks neither explain how this evidentiary ruling erred nor do they offer any legal authority in support of the argument. Consequently, the argument is forfeited. (*In re S.C.*, *supra*, 138 Cal.App.4th at p. 408; *Atchley v. City of Fresno*, *supra*, 151 Cal.App.3d at p. 647.)

V

CACI Nos. 413 and 1242

The Yelineks contend the trial court erred by giving CACI Nos. 413[2] and 1242.[3] The Yelineks do not seem to argue that the

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[2] The trial court instructed the jury with CACI No. 413 as follows: "Now, you may consider in all of these causes of action at issue is [*sic*] whether the defendant acted reasonably under the circumstances. You may consider customs or practices in the community in deciding whether the defendant acted reasonably. Customs and practices do not necessarily determine what a reasonable person would have done in defendant's situation. They are only factors for you to consider. Following a custom or practice does not excuse conduct that is unreasonable. You should consider whether the custom or practice itself is reasonable."

[3] The trial court instructed the jury with CACI No. 1242 regarding exclusion of implied warranties as follows: "Defendant Robert Lane claims that he is not responsible for any harm to Plaintiffs because Robert Lane eliminated any implied representations relating to the quality that a buyer would expect from the house or the house's fitness for a particular purpose. To succeed, Robert Lane must prove: [¶] That, before entering into the contract, Plaintiff's [*sic*] examined the house as fully as desired and that a complete examination would have revealed the house's deficiency. [¶] Or, [¶] That the

instructions misstate the law regarding evidence of custom or practices in the community. Instead, they appear to contend that the instructions pertained to law that is inapplicable to this case. Our uncertainty regarding the exact nature of the Yelineks' challenge to the giving of CACI Nos. 413 and 1242 arises from their failure to cite any legal authority in support of their argument.

The failure to provide any legal authority in support of the argument forfeits the contention on appeal. (*In re S.C.*, *supra*, 138 Cal.App.4th at p. 408; *Atchley v. City of Fresno*, *supra*, 151 Cal.App.3d at p. 647.)

VI

Claimed Error by the Trial Court in Commenting on the Evidence

The Yelineks contend the trial court erred by commenting on the competence of the realtors involved in the sales transaction. Appellants have forfeited this argument for lack of supporting authority or analysis. (*In re S.C.*, *supra*, 138 Cal.App.4th at p. 408; *Atchley v. City of Fresno*, *supra*, 151 Cal.App.3d at p. 647.)

As a separate ground, the issue is forfeited because counsel for the Yelineks did not object to the court's statements regarding the realtors' competence or request that the jury be admonished. "'In order to preserve an issue for

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parties' prior dealings and course of performance had eliminated any implied representations."

appeal, a party ordinarily must raise the objection in the trial court.' (*In re S.C.* (2006) 138 Cal.App.4th 396, 406.) 'The party also must cite to the record showing exactly where the objection was made.' (*Ibid.*) As the California Supreme Court recently reaffirmed, 'a reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court.' (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) 'The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected.' (*Ibid.*)" (*K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.* (2009) 171 Cal.App.4th 939, 948-949.)

VII

Claim that the Evidence "As a Whole" Favored the Yelineks

Under a section heading asserting that "the evidence as a whole dictates a determination in favor of the Plaintiffs/Appellants," the Yelineks set forth nearly three pages of evidence adduced at trial in support of their causes of action. In a closely related argument, the Yelineks contend "that no substantial evidence supports the defense verdict." These contentions have no merit.

Essentially, the Yelineks ask us to reweigh the evidence on appeal in order to conclude that they produced the more persuasive and credible evidence. This we cannot do. As an appellate court, we do not reweigh the evidence or second guess

witness credibility. (*People v. De Paula* (1954) 43 Cal.2d 643, 649.) Instead, we begin with the presumption that the trial court's judgment is correct and supported by substantial evidence. (*Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.)

In this case, substantial evidence established that the house and septic system were not defective when sold to the Yelineks. Michael Israel testified that the septic system was functioning properly and did not need to be replaced. Israel noted that the Yelineks would certainly secure final approval for the septic system upon making the six corrections called for in his October 2005 letter. Another expert, Douglas Ketron, noted that some of these six items for correction pertained to routine maintenance that is the responsibility of the property owner. The other items were of such a minor nature that they indicated no defect with the system's construction. Ketron concluded: "I can think of no logical reason to replace a functioning [septic] system with thousand[s] of dollars of something that's going to do exactly the same thing, that's already working."

The evidence also shows that Yelineks complained of problems with the house that were not Lane's obligation to fix. Moreover, the Yelineks refused Lane's attempts to repair their problems at his own expense.

Lane testified that the septic system and gas lines did not trespass onto the neighbor's property and that the house was free from construction defects when he sold it to the Yelineks.

In sum, the evidence was sufficient to support the judgment in favor of Lane.

VIII

Claimed Inconsistency in the Jury's Special Verdict

The Yelineks contend the jury returned inconsistent responses in its special verdict form by finding that Lane implicitly warranted the house to have been constructed skillfully but that Lane was not liable for damages. The Yelineks have forfeited the argument for failure to cite any legal authority in support of their contention on appeal.

Even if the argument were not forfeited, it would fail. As explained in part VII, *ante*, the record contains substantial evidence that Lane did not sell a house with construction defects to the Yelineks. Rather than reflecting any inconsistencies, the special verdict form reflected the jury's finding that the house warranted by Lane to be free from construction defects was actually free from such defects.

IX

Claimed Breach of Contract

The Yelineks next assert that they "certainly did not get the benefit of their bargain, and the evidence points to one conclusion: Robert Lane did not honestly and fairly represent

the condition of the Alpine property." Once again, we deem an argument by the Yelineks forfeited for failure to cite any legal authority. (*In re S.C.*, *supra*, 138 Cal.App.4th 396, 408; *City of Lincoln v. Barringer*, *supra*, 102 Cal.App.4th 1211, 1239, fn. 16; *Atchley v. City of Fresno*, *supra*, 151 Cal.App.3d at p. 647.)

Even if the argument were not forfeited, we would nonetheless reject it because rests on the faulty premise that the house was defectively constructed. As recounted in part VII, *ante*, substantial evidence supported the jury's conclusion that the house was not defective when sold to the Yelineks. Consequently, the argument lacks merit.

X

Exclusion of Testimony by Timothy Hall

The Yelineks argue that the trial court erred in excluding the testimony of their proposed witness, Timothy Hall. However, the Yelineks fail to cite where in the record that they called Hall as a witness or made any offer of proof regarding his proposed testimony. Consequently, as we shall explain, the argument is forfeited.

To challenge the trial court's exclusion of a witness's testimony, the proponent of the testimony must make a proper offer of proof to preserve the issue for appeal. (*Nienhouse v. Superior Court* (1996) 42 Cal.App.4th 83, 93-94; see Evid. Code § 354.) "An offer of proof must consist of material that is admissible, it must be specific in indicating the purpose of the

testimony, the name of the witness and the content of the answer to be elicited." (*Semsch v. Henry Mayo Newhall Memorial Hospital* (1985) 171 Cal.App.3d 162, 167.) "'The offer of proof exists for the benefit of the appellate court. The offer of proof serves to inform the appellate court of the nature of the evidence that the trial court refused to receive in evidence. . . .' [Citation.]" (*Nienhouse, supra,* 42 Cal.App.4th at pp. 93-94.)

Rather than citing to an offer of proof made at the time that the trial court excluded Hall's testimony, the Yelineks refer us to a declaration executed by Hall after the trial ended. A post-trial declaration cannot substitute for a timely and proper offer of proof. An offer of proof following entry of a verdict is too late to aid the trial court in its decision regarding whether the testimony of a particular witness may be introduced. "[U]ntil the proffered testimony is presented in proper form, [the opposing party] is not able to raise appropriate evidentiary objections, and it is difficult for the trial court to formulate a proper ruling on admissibility under Evidence Code section 352." (*Semsch v. Henry Mayo Newhall Memorial Hospital*, *supra*, 171 Cal.App.3d 162, 168.) The Yelineks' post-trial introduction of Hall's declaration was too late to preserve the issue for appellate review.

XI

Claimed Misapplication of Judicial Admissions by Lane

The Yelineks argue that the trial court failed to give proper effect to Lane's judicial admissions regarding installation of the propane tank on the neighbor's property and liability for damages arising out of the faulty installation. In the single paragraph comprising the argument, the Yelineks neither cite any legal authority nor advance a proper analysis of their assertion of error. As a result, the argument is forfeited. (*In re S.C.*, *supra*, 138 Cal.App.4th 396, 408; *City of Lincoln v. Barringer*, *supra*, 102 Cal.App.4th 1211, 1239, fn. 16; *Atchley v. City of Fresno*, *supra*, 151 Cal.App.3d at p. 647.)

XII

Attorney's Fees

The Yelineks argue that the trial court erred in awarding attorney's fees to Lane. They argue that he should be barred from receiving fees because he failed to mediate prior to litigating as required by the terms of the fee-shifting provision of the real estate sales contract. We disagree.

A

The "new construction residential purchase agreement" form signed by the Yelineks and Lane provided for fee-shifting as follows:

"28. ATTORNEY FEES: In any action, proceeding, or arbitration between Buyer and Seller arising out of this Agreement, the prevailing Buyer or Seller may be entitled to

reasonable attorney fees and costs from the non-prevailing Buyer or Seller, except as provided in Paragraph 22A."

The fee-shifting provision is subject to an exception, which is set forth in paragraph 22 of the purchase agreement as follows:

"22. DISPUTE RESOLUTION

"A. MEDIATION: Buyer and seller agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to arbitration or court action, subject to paragraphs 22C and D below. If any party commences an action based on a dispute or claim to which this paragraph applies, without first attempting to resolve the matter through mediation, then that party shall not be entitled to recover attorney fees, even if they would otherwise be available to that party in any such action. THIS MEDIATION PROVISION APPLIES WHETHER OR NOT THE ARBITRATION PROVISION IS INITIALED.

"[¶] . . . [¶]

"C. EXCLUSIONS FROM MEDIATION AND ARBITRATION: The following matters are excluded from mediation and arbitration: (i) a judicial or non-judicial foreclosure or other action or proceeding to enforce a deed of trust, mortgage, or installment land sale contract as defined in Civil Code §2985; (ii) an unlawful detainer action; (iii) the filing or enforcement of a mechanic's lien; (iv) any matter that is within the jurisdiction

of a probate, small claims, or bankruptcy court; and (v) an action for bodily injury or wrongful death . . . . The filing of a court action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction or other provisional remedies, shall not constitute a violation of the mediation and arbitration provisions.

"BROKERS; REFERRAL LICENSEE: Buyer and Seller agree to mediate and arbitrate disputes or claims involving either or both Brokers or Referral Licensee, provided either or both Brokers or Referral Licensee shall have agreed to such mediation or arbitration prior to . . . the dispute or claim is presented to the Brokers or Referral Licensee."

The record shows that Lane refused to engage in mediation prior to the Yelineks' filing of their complaint.

B

The Yelineks contend that the purchase agreement's terms disallow Lane from recovering his attorney's fees. "On appeal, we review the determination of the legal basis for an award of attorney fees de novo as a question of law." (*Blackburn v. Charnley* (2004) 117 Cal.App.4th 758, 767.)

The purchase agreement's bar on recovering attorney's fees does not apply to Lane because he did not commence the legal action. The exception to the fee-shifting provision in the purchase agreement expressly states: "*If any party commences an action* based on a dispute or claim to which this paragraph

applies, without first attempting to resolve the matter through mediation, then *that party* shall not be entitled to recover attorney fees . . . ." (Italics added.)

Lane neither brought a complaint nor a cross-complaint in this case. Thus, Lane was not barred from receiving attorney's fees by the application of paragraph 22.

In *Johnson v. Siegel* (2000) 84 Cal.App.4th 1087 (*Johnson*), the Court of Appeal came to the same conclusion in deciding a challenge to a real estate purchase agreement providing "that in any action between the Buyer and Seller, the prevailing party would be entitled to recover attorney fees, unless *that* party commenced an action without first attempting to resolve the matter through mediation." (*Id.* at p. 1101.) The case involved a legal action initiated by Stephen Johnson against Howard and Diane Siegel for fraud and negligent misrepresentation after the house proved to be very leaky in inclement weather. (*Id.* at p. 1091 & fn. 1.) The Siegels received attorney fees after prevailing at trial. Johnson appealed, and the Court of Appeal rejected the contention that the Siegels had forfeited the right to recover attorney fees by refusing to mediate. The *Johnson* court explained: "Had the Siegels initiated an action without first attempting to resolve the matter through mediation, it would have applied to them. It was Johnson, however, who filed an action without first attempting to resolve the matter through mediation. By filing the action, Johnson forfeited his right to

recover attorney fees. [¶] . . . Seeking mediation is a condition precedent to the recovery of attorney fees *by the party who initiates the action*." (*Id.* at p. 1101.) As in *Johnson*, the defendant in this case is not barred from receiving attorney fees because he did not commence the legal action.

In arguing for a different conclusion, the Yelineks rely on *Frei v. Davey* (2004) 124 Cal.App.4th 1506. The Yelineks point out that the defendant in *Frei v. Davey* was barred from recovering fees after failing to agree to mediation in a timely manner. (*Id.* at p. 1508.) *Frei v. Davey* is readily distinguishable. That case involved sellers of a house (the Daveys) who filed a cross-complaint against the buyer and the real estate broker involved in the sale. (*Id.* at p. 1511.) Although the Daveys were defendants in the complaint filed by the Freis, the Daveys themselves asserted causes of action in their cross-complaint. (*Id.* at pp. 1510-1511.) By contrast, Lane did nothing but defend against the Yelineks' complaint. He commenced no legal action and is therefore not barred for failure to mediate.

The trial court did not err in awarding attorney's fees to Lane.

XIII

Costs

The Yelineks contend that the trial court erred in awarding costs not authorized by Code of Civil Procedure section 1033.5.[4] We reject the argument.

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[4] Code of Civil Procedure section 1033.5 provides in pertinent part: "(a) The following items are allowable as costs under Section 1032: [¶] (1) Filing, motion, and jury fees. [¶] (2) Juror food and lodging while they are kept together during trial and after the jury retires for deliberation. [¶] (3) Taking, video recording, and transcribing necessary depositions including an original and one copy of those taken by the claimant and one copy of depositions taken by the party against whom costs are allowed, and travel expenses to attend depositions. [¶] (4) Service of process by a public officer, registered process server, or other means . . . [¶] (5) . . . [¶] Expenses of attachment including keeper's fees. [¶] (6) Premiums on necessary surety bonds. [¶] (7) Ordinary witness fees pursuant to Section 68093 of the Government Code. [¶] (8) Fees of expert witnesses ordered by the court. [¶] (9) Transcripts of court proceedings ordered by the court. [¶] (10) Attorney's fees, when authorized by any of the following: [¶] (A) Contract. [¶] (B) Statute. [¶] (C) Law. [¶] (11) Court reporter fees as established by statute. [¶] (12) Models and blowups of exhibits and photocopies of exhibits may be allowed if they were reasonably helpful to aid the trier of fact. [¶] (13) Any other item that is required to be awarded to the prevailing party pursuant to statute as an incident to prevailing in the action at trial or on appeal.

"(b) The following items are not allowable as costs, except when expressly authorized by law: [¶] (1) Fees of experts not ordered by the court. [¶] (2) Investigation expenses in preparing the case for trial. [¶] (3) Postage, telephone, and photocopying charges, except for exhibits. [¶] (4) Costs in investigation of jurors or in preparation for voir dire. [¶] (5) Transcripts of court proceedings not ordered by the court."

The costs specifically challenged by the Yelineks are: (1) $450 in "witness fees," (2) $46 for "models, blowup," (3) $64 in copies from the court file, (4) $530.20 in "court reporter fees," and (5) $1,072 in "other" costs.

The categories of costs claimed by Lane do not obviously violate Code of Civil Procedure section 1033.5, which provides for witness fees (subd. (a)(7)), costs of models and blowups (subd. (a)(12)), photocopying costs for the reproduction of exhibits (subd. (a)(12)), and court reporter fees when transcripts are ordered by the court (subd. (b)(5)). Additionally, subdivision (c)(4) provides that "[i]tems not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion."

The Yelineks fail to demonstrate that the trial court exceeded its authority under Code of Civil Procedure section 1033.5 in awarding these costs. They offer no analysis of how the costs within these categories exceed statutory authorization. "'A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general of principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

The Yelineks have failed to demonstrate that the trial court erred in awarding costs.

DISPOSITION

The judgment is affirmed. Because respondent Robert Lane has filed no respondent's brief in this court, we deem it appropriate that the parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

SIMS, J.

We concur:

BLEASE, Acting P. J.

CANTIL-SAKAUYE, J.